

FEDERAL ELECTION COMMISSION

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FIRST GENERAL COUNSEL'S REPORT

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MUR: 6948

DATE FILED: July 6, 2015

DATE OF NOTIFICATION: July 13, 2015

DATE OF LAST RESPONSE: August 23, 2015

DATE ACTIVATED: September 17, 2015

ELECTION CYCLE: 2016

EXPIRATION OF SOL: February 13, 2020 to
March 17, 2020

COMPLAINANT:

Foundation for Accountability and Civic Trust

RESPONDENTS:

Nancy Rotering

Nancy Rotering for Congress and Michael Kreloff
in his official capacity as treasurer

**RELEVANT STATUTES
AND REGULATIONS:**

52 U.S.C. § 30101(2)¹

52 U.S.C. § 30102(e)(1)

52 U.S.C. § 30103(a)

52 U.S.C. § 30104(a) and (b)

11 C.F.R. § 100.72

11 C.F.R. § 100.131

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

The Complainant in this matter alleges that Nancy Rotering violated the Federal Election Campaign Act of 1971, as amended (the "Act"), by failing to register as a candidate with the Commission until March 2015 even though she became a candidate for Congress in late January 2015 by receiving campaign contributions in excess of \$5,000. Rotering and her campaign

¹ On September 1, 2014, the Federal Election Campaign Act of 1971, as amended (the "Act"), was transferred from Title 2 to new Title 52 of the United States Code.

1 committee, Nancy Rotering for Congress ("Committee"), assert that she complied with the
2 Commission's "testing the waters" regulations, she only became a candidate for Congress in
3 early March 2015, and she timely filed her Statement of Candidacy. Because the information
4 supports the Respondents' claims, we recommend that the Commission find no reason to believe
5 that Nancy Rotering violated 52 U.S.C. § 30102(e)(1). We also recommend that the
6 Commission find no reason to believe that the Committee violated 52 U.S.C. §§ 30103(a),
7 30104(a) or 30104(b), and close the file.

8 II. FACTUAL AND LEGAL ANALYSIS

9 A. Factual Summary

10 Nancy Rotering is a candidate for United States Congress from the Tenth Congressional
11 District of Illinois in 2016. She filed her Statement of Candidacy on March 17, 2015,
12 designating the Committee as her principal campaign committee, and the Committee filed its
13 Statement of Organization that same day. The Committee's initial disclosure report, the 2015
14 April Quarterly, disclosed a \$25,000 loan from the candidate on January 15 and itemized
15 contributions from other persons starting on January 23.²

16 The Complaint alleges that Rotering raised over \$5,000 by January 29, 2015, and thereby
17 became a candidate, but did not register as a candidate until March.³ The Complaint also alleges
18 that Rotering was bound by the Act's reporting requirements, "which do not appear to have been
19 met."⁴ The Complaint notes that at the time Rotering announced her candidacy, a press account

² 2015 April Quarterly at 34, 49, 63, 103 (Apr. 15, 2015).

³ Compl. at 1-2.

⁴ *Id.* at 1.

1 reported that Rotering said she would have about \$400,000 in her "campaign war chest."⁵ The
2 Complainant acknowledges that Commission regulations permit individuals to delay registering
3 as a candidate after raising \$5,000 and engage in "testing the waters" activities to determine the
4 feasibility of a viable campaign, but alleges that the "testing the waters" exceptions did not apply
5 to Rotering because she was amassing \$400,000 in campaign funds that would be spent after she
6 declared her candidacy.⁶

7 In a joint response, Rotering and the Committee ("Respondents") assert that there is no
8 reason to believe that they violated the Act as Complainant alleged: Rotering "tested the waters"
9 for five weeks in early 2015, decided to run on March 3, 2015, and timely filed her Statement of
10 Candidacy.⁷ While Rotering tested the waters, Respondents assert, Rotering met with potential
11 supporters, discussed the structure of a potential campaign, and asked people to contribute to the
12 exploratory committee, but was cautious in describing all activities as exploratory.⁸

13 Additionally, Respondents submitted an affidavit from the Committee's treasurer,
14 Michael Kreloff,⁹ who avers that during Rotering's "exploratory phase," there was no active
15 website, the bank account was named "Nancy Rotering Exploratory Committee" and
16 contribution checks were routinely made out to that entity, no blast e-mails were sent, and
17 written materials were clear that Rotering was only testing the waters.¹⁰ A flyer prepared by

⁵ *Id.* at 2 and Exhibit A (Lynn Sweet, *Highland Park Mayor Nancy Rotering Joins 10th District Race Vs. Ex-Rep. Schneider*, CHICAGO SUN-TIMES, Mar. 16, 2015).

⁶ *Id.* at 2-3.

⁷ *Id.* at 1-2, 5.

⁸ *Id.* at 1.

⁹ Kreloff is also serving as counsel to the Committee and the candidate. *See* Designation of Counsel forms dated August 6, 2015.

¹⁰ Response, Kreloff Aff. ¶¶ 5-9.

1 Rotering's Exploratory Committee and contribution checks attached to the affidavit support
2 Kreloff's assertion.¹¹ Kreloff further avers that expenditures were made for appropriate testing
3 the waters activities, such as polling, and meeting with potential supporters, strategists, and
4 contributors, and no news reports quoted Rotering as doing anything more than exploring a
5 campaign.¹²

6 **B. Legal Analysis**
7

8 An individual is deemed to be a "candidate" for purposes of the Act if he or she receives
9 contributions or makes expenditures in excess of \$5,000.¹³ Once an individual meets the \$5,000
10 threshold, he or she has fifteen days to designate a principal campaign committee by filing a
11 Statement of Candidacy.¹⁴ The principal campaign committee must then file a Statement of
12 Organization within 10 days of its designation,¹⁵ and must file disclosure reports with the
13 Commission in accordance with 52 U.S.C. § 30104(a) and (b).

14 The Commission has established limited exemptions from these thresholds, which permit
15 an individual to test the feasibility of a campaign for federal office without becoming a candidate
16 under the Act. Commonly referred to as the "testing the waters" exemptions, 11 C.F.R.
17 §§ 100.72 and 100.131 respectively exclude from the definitions of "contribution" and
18 "expenditure" those funds received, and payments made, to determine whether an individual

¹¹ *Id.* Attach. B, D.

¹² *Id.* ¶¶ 10-11.

¹³ 52 U.S.C. § 30101(2).

¹⁴ 52 U.S.C. § 30102(e)(1); 11 C.F.R. § 101.1(a).

¹⁵ 52 U.S.C. § 30103(a).

1 should become a candidate.¹⁶ "Testing the waters" activities include, but are not limited to,
2 payments for polling, telephone calls, and travel.¹⁷ An individual who is "testing the waters"
3 need not register or file disclosure reports with the Commission unless and until the individual
4 subsequently decides to run for federal office or conducts activities that indicate he or she has
5 decided to become a candidate.¹⁸ All funds raised and spent for "testing the waters" activities
6 are, however, subject to the Act's limitations and prohibitions.¹⁹

7 Once an individual begins to campaign or decides to become a candidate, funds that were
8 raised or spent to "test the waters" apply to the \$5,000 threshold for qualifying as a candidate and
9 the candidate must register with the Commission.²⁰ And after an individual reaches candidate
10 status, all reportable amounts from the beginning of the "testing the waters" period must be
11 disclosed on the first financial disclosure report filed by the candidate's committee, even if the
12 funds were received or expended prior to the current reporting period.²¹ Certain activities may
13 indicate that the individual has decided to become a candidate and is no longer "testing the
14 waters." Commission regulations set out five non-exhaustive factors to be considered in
15 determining whether an individual has decided to become a candidate. An individual indicates
16 that he or she has gone beyond "testing the waters" and has decided to become a candidate, for

¹⁶ The Commission has emphasized the narrow scope of these exemptions to the Act's disclosure requirements. *See Explanation and Justification for Regulations on Payments Received for Testing the Waters Activities*, 50 Fed. Reg. 9992, 9993 (Mar. 13, 1985) ("The Commission has, therefore, amended the rules to ensure that the 'testing the waters' exemptions will not be extended beyond their original purpose. Specifically, these provisions are intended to be limited exemptions from the reporting requirements of the Act . . ."). *See* 52 U.S.C. § 30101(8), (9).

¹⁷ 11 C.F.R. §§ 100.72(a), 100.131(a).

¹⁸ *See id.*; *see also* Advisory Op. 1979-26 (Grassley).

¹⁹ 11 C.F.R. §§ 100.72(a), 100.131(a).

²⁰ *Id.*; *see* Factual and Legal Analysis at 3, MUR 6533 (Perry Haney); Factual and Legal Analysis at 5, MUR 6449 (Jon Bruning).

²¹ *See* 11 C.F.R. §§ 100.72(a), 100.131(a), 101.3, 104.3(a), 104.3(b).

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1 example, by (1) using general public political advertising to publicize his or her intention to
2 campaign for federal office; (2) raising funds in excess of what could reasonably be expected to
3 be used for exploratory activities or undertaking activity designed to amass campaign funds that
4 would be spent after he or she becomes a candidate; (3) making or authorizing written or oral
5 statements that refer to him or her as a candidate for a particular office; (4) conducting activities
6 in close proximity to the election or over a protracted period of time; or (5) taking action to
7 qualify for the ballot under state law.²² These regulations seek to draw a distinction between
8 activities directed to an evaluation of the feasibility of one's candidacy, as distinguished from
9 conduct signifying that a private decision to become a candidate has been made.²³

10 The Complaint alleges that Rotering became a candidate when she raised \$5,000 in late
11 January 2015 but did not promptly file her Statement of Candidacy so she could amass \$400,000
12 in campaign funds that would be spent after she declared her candidacy. According to the
13 Committee's initial disclosure report, the 2015 April Quarterly Report, the Committee had raised
14 \$163,000 (plus the \$25,000 loan from the candidate) by March 3, 2015, when she decided to
15 run,²⁴ and a total of \$247,180 before she filed her Statement of Candidacy on March 17, 2015.²⁵

16 In previous matters, the Commission has not found reason to believe that an individual
17 went beyond the "testing the waters" exemptions and became a candidate simply because he or
18 she raised a significant amount of funds. See MUR 6224 (Fiorina) (no reason to believe where a
19 U.S. Senate candidate committee raised in excess of \$600,000 and spent over \$300,000 during

²² 11 C.F.R. §§ 100.72(b), 100.131(b).

²³ See Advisory Op. 1981-32 (Askew).

²⁴ The Response states that excluding Rotering's personal funds, the Committee raised \$166,843 prior to Rotering's announcement that she was a candidate. See Response at 5 and Kreloff Aff. ¶ 12.

²⁵ On September 9, 2015, the Committee filed an amended 2015 April Quarterly Report, but there is no change to the amount of contributions raised prior to March 17, 2015.

1 the testing the waters phase); MUR 5934 (Thompson) (no reason to believe where presidential
2 candidate committee raised \$9.52 million and spent only \$2.9 million before formal candidate
3 announcement); MUR 5930 (Schuring) (no reason to believe where a congressional candidate
4 committee raised \$194,000); MUR 5703 (Rainville) (no reason to believe where congressional
5 candidate committee raised \$100,000); and MUR 5661 (Butler) (no reason to believe where a
6 U.S. Senate candidate's campaign raised \$100,000). Thus, the amount of Respondents'
7 fundraising does not itself suggest candidate status for Rotering earlier than March 2015.

8 Nor does the available information suggest that Rotering went beyond "testing the
9 waters" by her other actions, for example, by making or authorizing statements indicating she
10 was a candidate, or conducting "testing the waters" activities over a protracted period of time or
11 in close proximity to the election; her asserted testing the waters period lasted 33 days and took
12 place over a year before the 2016 primary election.²⁶

13 Because the available information does not indicate that Rotering untimely filed her
14 Statement of Candidacy, we recommend that the Commission find no reason to believe that she
15 violated 52 U.S.C. § 30102(e)(1). And the Committee filed its Statement of Organization on the
16 same day that Rotering filed her Statement of Candidacy, so the Committee's statement was also
17 timely.

18 Accordingly, we recommend that the Commission find no reason to believe that the
19 Committee violated 52 U.S.C. § 30103(a). Finally, because the Committee timely filed its initial
20 disclosure report, the 2015 April Quarterly Report, and disclosed contributions accepted and

²⁶ See 11 C.F.R. §§ 100.72(b)(3), (b)(4), 100.131(b)(3), (b)(4).

disbursements made prior to Rotering's status as a candidate,²⁷ we recommend that the Commission find no reason to believe that the Committee violated 52 U.S.C. §§ 30104(a) or (b).

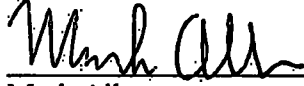
III. RECOMMENDATIONS

1. Find no reason to believe that Nancy Rotering violated 52 U.S.C. § 30102(e)(1);
2. Find no reason to believe that Nancy Rotering for Congress and Michael Kreloff in his official capacity as treasurer violated 52 U.S.C. §§ 30103(a), 30104(a) or 30104(b);
3. Approve the attached Factual and Legal Analysis;
4. Approve the appropriate letters; and
5. Close the file.

Daniel A. Petalas
Acting General Counsel

12.16.15
Date


Stephen A. Gura
Deputy Associate General Counsel for Enforcement


Mark Allen
Assistant General Counsel


Delbert K. Rigsby
Attorney

Attachment
Factual and Legal Analysis

²⁷ See 11 C.F.R. §§ 101.3, 104.3(a), 104.3(b).